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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In the

Supreme Court of the United States

October Term, 1951

No. 293

UNITED STATES OF AMERICA,
Petitioner

v.

LANCE, INCORPORATED,
Respondent

FRANK H. KENNEDY,
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III. Comment on the So-Called "Practical Considerations" Referred to in Petitioner's Brief.

ARGUMENT

I. The Statute of Limitations in the Portal-to-Portal Act is Applicable to Suits Instituted by the United States Under the Walsh-Healey Act.

The Walsh-Healey Act provides, Sec. 2 (p. 25 of brief of petitioner) that "any breach or violation of any of the representations and stipulations in any contract . . . shall render the party responsible therefor *liable to the United States of America for liquidated damages* in addition to damages for any other breach of such contract *in the sum of $10.00 per day . . .*" (Emphasis added).

The statute of limitations in the Portal-to-Portal Act, Sec. 6 (p. 31 of brief of petitioner) provides "Any action commenced . . . to enforce any cause of action for . . . *liquidated damages, under . . . the Walsh-Healey Act . . .*" shall be barred as therein provided. (Emphasis added).

The complaint in this action alleges, paragraphs 4 and 5 (p. 1 of the transcript of the record) that respondent is indebted to the United States of America in the sum of $1990.00 *as liquidated damages under the Walsh-Healey Act*, that is, $10.00 per day for a total of 199 days. Thus, the complaint alleges an indebtedness by the respondent in the exact words of the Walsh-Healey Act as to liability and in the exact words of the Portal-to-Portal Act which bars any action for *"liquidated damages under . . . the Walsh-Healey Act"*. (Emphasis added).

Congress could not have made any clearer its intent that the statute of limitations of the Portal-to-Portal Act should apply to the liquidated damages of the Walsh-Healey Act because that is exactly what the Portal-to-Portal Act says.

The Walsh-Healey Act provides that anyone liable under the Act is liable to the United States of America for liquidated damages. *No other liquidated damages of any kind*

are mentioned in the Act; therefore, when it refers to liquidated damage, it could only refer to the liquidated damages for which there is liability to the United States.

As was said by Judge Sibley of the United States Court of Appeals for the Fifth Circuit in the opinion in the case of *United States of America* v. *Lovknit Mfg. Co., Inc. et al.* (bottom of p. 23 and top of p. 24 of the record of the proceedings in said court, No. 294 on petition for certiorari in this Court):

> "There is no need to name the United States in a statute if the intent to affect the United States is clear otherwise, as from the subject matter dealt with".

The petitioner cites no authority in support of its contention that the statute of limitations in the Portal-to-Portal Act does not apply to the United States, and so far as we know there is no such authority. All of the courts, so far as we know that have expressly passed on this point, have held that the statute of limitations in the Portal-to-Portal Act does apply to suits instituted by the United States under the Walsh-Healey Act. *United States* v. *Harp*, 80 F. Supp. 236 (W. D. Okla., Broaddus, J.); *United States* v. *Craddock-Terry Shoe Corp.*, 84 F. Supp. 842 (W. D. Va., Paul, C. J.); *United States* v. *Sweet Briar, Inc.*, 92 F. Supp. 777 (W. D. S. C., Wyche, J.); *United States* v. *Lance, Inc.*, 95 F. Supp. 327 (W. D. N. C., Warlick, J.), (the instant case); *United States* v. *Lance, Inc.*, 190 F. 2d 204 (Court of Appeals for the Fourth Circuit) (the instant case); *United States* v. *Lovknit Mfg. Co., Inc., et al.*, 90 F. Supp. 679 (N. D. Texas, Atwell, C. J.); *United States of America* v. *Lovknit Mfg. Co. Inc.*, 189 F. 2d 454 (Court of Appeals for the Fifth Circuit), (No. 294 on petition for certiorari in this Court).

Most of the above cases are referred to on p. 19 of the

brief of petitioner in this case but none of them hold with the petitioner on this point. All of them expressly hold contrary to the petitioner's contention except that in the case of *United States* v. *Hudgins-Dize Co. Inc.*, 83 F. Supp 593 (E. D. Va. Bryan, J.) the judge seemed to assume that the statute of limitations does apply to the United States and clearly does not hold to the contrary.

II. The Cause of Action Accrued When the Violation of the Act Occurred and Since Suit Was Not Brought for More Than Four Years After the Violations Occurred the Suit is Barred by the Two-year Statute of Limitations in the Portal-to-Portal Act.

The Walsh-Healey Act provides as pointed out above that any party responsible for any breach or violation shall be liable to the United States of America for liquidated damages *in the sum of $10.00 per day.* It is the position of the respondent that if an employer violated the Act by employing one person for one day contrary to the Act the United States by the Attorney General could sue for that single violation the next day after it occurred. There would necessarily be a separate cause of action for each day's violation; if this were not true an employer whose violation consisted of only one day would not be liable at all.

The section of the Portal-to-Portal Act dealing with the statute of limitations, sec. 6 (p. 31 of brief of petitioner) provides that if the cause of action accrued prior to May 14, 1947 (as in this case) any action may be commenced within whichever of the following periods is shorter: (1) Two years after the cause of action accrued, or (2) the period prescribed by the applicable State statute of limitations.

The general rule is that a statute of limitations begins to run at the time the cause of action accrues. When the basis

of the cause of action is an act prohibited by law or contract the cause of action accrues when the prohibited act is done. Here the prohibited act is employment of minors and under the general rule the statute of limitations would start running at the conclusion of each day's violation.

There is nothing in the language of the Portal-to-Portal Act to take it out of the general rule but on the contrary, its language and the language of the House Committee on the Judiciary in its report to Congress on the Act clearly show that the general rule was meant to apply.

The Judiciary Committee in its report to Congress had the following to say regarding the statute of limitations in the Portal-to-Portal Act (House Report No. 71, February 25, 1947, 1947 U. S. Code Congressional Service, page 1035):

> "1. STATUTE OF LIMITATIONS
>
> "Actions for the recovery of wages, overtime compensation, penalties, or damages (actual, liquidated, or compensatory) must be commenced within 1 year after the cause of action accrued. This provision applies to actions accruing both before and after the effective date of this act. Causes of action which had accrued more than 1 year prior to the effective date of the act may nevertheless be commenced within 6 months after said effective date. As to the individual claimant, the action is deemed to be commenced when he is named as a party to the action. In other words, the commencement of an action does not stop the running of the statute for all those who later become parties. Causes of action which on the effective date of the act are already barred by any applicable State statute of limitations are not revived but remain barred. In computing the 1-year or 6-month period, the period or periods of time during which a defendant is not found within the United States so that process may be served on him, will be excluded.

> "The limitation herein provided applies only to the statutory actions or proceedings set forth in the acts enumerated in section 5 of H. R. 2157. Actions under the common law, or under State statutes for recovery of wages are not affected.
>
> "The desirability of a uniform Federal statute of limitations has often been pointed out. In the absence of such a statute, courts are required to enforce the State statute deemed to be applicable. (See U. S. Code, title 28, sec. 725). This has caused confusion and a lack of uniformity throughout the Nation."

The Committee's report makes no mention of any administrative determination as fixing the time when the statute of limitations would begin to run. The Committee here is giving a summary with regard to the statute of limitations and if the contention of the petitioner is correct, *it left out of the summary what would have been the most important thing to include*—that is, that the statute would not begin to run until there had been an administrative determination.

The Committee says that the desirability of a uniform Federal statute of limitations has often been pointed out, that in the absence of such a statute courts are required to enforce the state statutes and that this has caused confusion and a lack of uniformity throughout the nation. The inescapable inference is that the adoption of the proposed law would eliminate such confusion and lack of uniformity. It is submitted that if the contention of the petitioner is correct, the effect of the statute would be just the opposite of what the Committee meant its effect to be, because the situation would be far worse than if the Federal courts applied the state statutes. At least, the state statutes require an action to be brought within a specific period of time, even though the time specified may vary in the different states; while according to the contention of the petitioner, there would

never be any specific period of time dating from the occurrence of the violation within which suit must be brought. The administrator could take any number of years within which to make his determination and any number of years, plus the two years prescribed by the statute, add up to an indefinite period in each and every case.

The findings of Congress in connection with the Portal-to-Portal Act (printed in the brief of the petitioner, pp. 28, 29 and 30) state very clearly that it was the intention of Congress to give employers some relief, and it is stated (middle of p. 30) in the findings that "the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry". The Congress here refers to the State statutes of limitation and it plainly intends to give employers relief in this respect rather than impose additional burdens upon them as would plainly be the case if the contention of the petitioner were allowed to prevail.

Section 6, paragraph (b) of the Portal-to-Portal Act (p. 31, brief of petitioner) provides that the action may be commenced within whichever of the following periods is the shorter: "(1) two years after the cause of action accrued, or (2) the period prescribed by the applicable State statute of limitations", and in paragraph (c) it provides that the action shall not be barred by paragraph (b) if it is commenced within 120 days after May 14, 1947, unless at the time commenced it is barred by an applicable State statute of limitations.

These references to State statutes of limitation seem to make it clear beyond any doubt that the law meant the statutes of limitation to run from the time of the violation of the Act, or, in other words, the law contemplates that the

cause of action arose when the Act was violated and not upon the final determination of any administrative proceeding, for the reason that *in referring to State statutes the Act could not possibly have had in contemplation any administrative proceeding before the Secretary of Labor.*

There is nothing in the Walsh-Healey Act that requires the Secretary of Labor to conduct an administrative proceeding with regard to liability for liquidated damages; nor is there anything in the Act that *requires* the Secretary of Labor to conduct an inquiry with regard to *any* matter except as provided in paragraph 3 of the Act relating to black-listing. The matters with regard to which administrative proceedings are to be conducted are left to the discretion of the Secretary of Labor. The Act provides in Sec. 5 (p. 26 of brief of petitioner) that "Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract . . . the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath". The language is "shall have the power" but there is nothing in the Act that makes it obligatory upon the Secretary of Labor to exercise this power and, therefore, such an administrative proceeding is necessarily optional with him.

If Congress had intended that an administrative determination would be a prerequisite to starting a suit against an employer under the Act, it would have (1) made such an administrative determination mandatory and (2) would have required that such a determination be made within a specified length of time. The fact that the Act does not provide for either of these things indicates that Congress had no intention of postponing the beginning of the running of the statute until such a determination had been made.

As was said by Judge Sibley in the opinion in the case of *United States of America* v. *Lovknit Manufacturing Co. Inc., et al., supra*:

> "Stated otherwise the assertion is that such hearings and findings are a prerequisite to a suit by the Attorney General. We do not agree. The Act nowhere so conditioned his suit. Many breaches of contract can occur in which a hearing and a finding of facts would be of no help but a cause of delay."

Section 3 of the Walsh-Healey Act provides as follows:

> "The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by sections 35-45 of this title. Unless the Secretary of Labor otherwise recommends no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred."

It is required as a prerequisite to the "black-listing" of a contractor under Section 3 of the Act that a finding be made by the Secretary of Labor to the effect that such contractor has breached an agreement or representation required by the Act. This section is in contrast to Section 2 of the Act (Page 25 of the petition for certiorari), which not only does not require an administrative determination based upon a formal hearing but does not require a finding of any sort by the Secretary of Labor as a prerequisite to resorting to the remedies therein referred to, including the institution of suit in court for liquidated damages.

Under the Act (Sec. 2), the Attorney General is given the power to bring suit for liquidated damages without any restrictions. If it had been the intention of Congress to make the right of the Attorney General to bring suit subject to an administrative determination, it would have said so.

It is contended that if a cause of action arose when the violation occurred, there was a second cause of action that arose when the administrative determination was made, but the statute is clear that only one cause of action is created by the Act. The language is (Sec. 6, Portal-to-Portal Act, p. 31 of brief of petitioner) in each of the three sub-paragraphs (a), (b) and (c): "If *the* cause of action" (Emphasis added) accrues or accrued "on or after" or "prior to", etc., then it is barred within the time stated. There is no suggestion anywhere of more than one cause of action.

The Court of Appeals for the Fifth Circuit held in the case of *United States* v. *Lovknit Manufacturing Co. Inc., et al., supra,* as did the Court of Appeals for the Fourth Circuit in the instant case, that the cause of action accrued when the violations occurred. There is, therefore, no conflict between the Courts of Appeals. Furthermore, all of the District Court decisions that had held contra were reversed by these decisions of the Courts of Appeals for the Fourth or Fifth Circuits except the case of *United States* v. *Harp, supra.* It is submitted that the Judge in this opinion seemed to assume, without explanation, that the question here presented falls within that class of cases where the statute in question makes liability dependent upon the decision and action of an administrative board so that a cause of action does not arise until the board has acted, and made no attempt to explain why this rule should apply in view of the fact that the Walsh-Healey Act does not make the cause of action dependent upon the administrative determination.

The petitioner in its brief cites the case of *Endicott John-*

son Corp. v. *Perkins,* 317 U. S. 501 and quotes several excerpts from it. But in that case there was involved the validity of a subpoena issued by the Secretary of Labor in an administrative proceeding and the language of the court throughout the opinion related to the interpretation of the Walsh-Healey Act as it applied to that particular situation, and it does not follow that the language of the court would necessarily apply to the question presented in the instant case.

The same can be said with reference to the case of *Anderson* v. *Schwellenbach,* 70 F. Supp. 14, a District Court case in which action was brought by the plaintiffs to enjoin administrative proceedings against them in the Department of Labor under the Walsh-Healey Act.

In the case of *Woods* v. *Stone,* 333 U. S. 472, involving the Emergency Price Control Act of 1942, the statute provided that the action should be brought within one year "of the occurrence of the violation". The real question in the case was when the violation occurred—whether it occurred when the rentals were collected or on the date when the landlord was ordered to refund the excess. The Supreme Court said in its opinion:

> "The statute and regulations made his rentals tentative but not unlawful. Until the contingency of readjustment occurred the tenant could have had no cause of action for recovery of any part of the rental exacted by the landlord. The cause of action now does not rest upon, and hence cannot date from mere collection. The duty to refund was created and measured by the refund order and was not breached until that order was disobeyed".

In the instant case, the employment of the minors was unlawful at the date of employment, and was made so by

statute and not by administrative determination; the "breach" occurred upon violation of the statute and hence the statute began to run at that time.

In *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258, the Supreme Court said that the action was grounded upon the determination evidenced by the certificate of over-assessment issued by the Commissioner of Internal Revenue; that upon delivery of this certificate to the plaintiff there arose a cause of action on which the suit was brought and the statute of limitations began to run only from the date of such delivery. This certificate of over-assessment constituted a formal admission of liability of the United States to the taxpayer and the holding of the court that the delivery of such a *certificate admitting liability* created a cause of action creates no precedent or reason for holding that the cause of action in the instant case did not arise until an *administrative determination* had been made. No admission of liability is involved in the instant case.

III. Comment on the So-Called "Practical Considerations" Referred to in Petitioner's Brief.

From Page 5 to Page 12 of the petitioner's brief there is a statement of facts and conclusions which are referred to on p. 12 as "practical considerations".

On p. 5 the statement is made that "Pursuant to the statutory directions and authorizations, the procedure was early established in the Department of Labor, after investigations had indicated possible non-compliance, of issuing formal complaints and holding hearings before a trial examiner . . ." On p. 6 the procedure is described as follows: "Investigation of the contractor, the discovery of violations, the institution of administrative proceedings, the preparation for and conduct of hearings, the making of the initial administrative

report, the completion of successive administrative appeals, the rendition of the final administrative decision, and the filing of suit by the Attorney General after failure to secure voluntary payment by the Secretary of Labor." *We submit that there is no requirement in the Walsh-Healey Act that this cumbersome, burdensome and expensive procedure be resorted to where there is a claim for liquidated damages.* This procedure involves, on the part of the contractor, preparation for and attending an administrative hearing, employing an attorney, presenting evidence, two administrative appeals if the finding is adverse, and then if the final determination is adverse, he must go through a regular trial in the District Court if he still contends that he is not liable. It is difficult to believe that Congress ever intended that its citizens should be harassed with the annoyance and expense of two lawsuits when one would serve the purpose equally well. The administrative procedure serves a useful function in connection with some matters under the jurisdiction of the Secretary of Labor, but there is no need to invoke it when the contractor denies liability, and it is clear that a lawsuit will result.

On p. 11 of the brief it is stated that it was found necessary to institute formal administrative proceedings in only 46 cases and to bring suit in only 25 cases. This means that settlements were obtained in 21 cases by the administrative procedure but in 25 of the cases the administrative procedure accomplished nothing at all. In all probability, settlements in the 21 cases would just as easily have been obtained if the original suit had been instituted in the District Court without any administrative proceeding at all.

If original suits were instituted in the District Courts and the cumbersome administrative determination eliminated, the Department of Labor would save the long period of time that it takes for an administrative determination to be had

and would have little difficulty in getting its suits instituted in the District Courts within two years from date of violation.

On p. 7 of the brief it is stated: "Moreover, the effect of the decision, if permitted to stand, will be virtually to bring to a halt enforcement of the Walsh-Healey Act and to disrupt long standing procedures consistently followed . . ." Judge Sibley said in the opinion in the case of *United States* v. *Lovknit Manufacturing Co., supra*: "We equally do not doubt that if it be considered that the entire case may be conveniently tried without any administrative hearing, that can be done". It is our position that the Department of Labor has given the Walsh-Healey Act an interpretation that was unwarranted, that no administrative hearing is required in suits by the United States for liquidated damages under the Act, that this procedure with reference to suits for liquidated damages should never have been instituted, that the Department of Labor has only itself to blame for its error in setting up a procedure that is neither required nor justified, and that this procedure, as regards suits for liquidated damages, ought to be abandoned in any event.

The Act can be effectively enforced by bringing suits for liquidated damages originally in the District Courts and eliminating the administrative proceeding altogether. It is stated in the brief, p. 7, that there are now pending in the courts and in various stages of administrative proceedings 53 cases and that in virtually all of these the claims will be barred under the interpretation given by the court below of Sec. 6 of the Portal Act. We are not given the exact facts as to the number that will be barred but no matter what the number is, in all probability, they would not have been barred if the original suits had been instituted in the District Courts at the time the administrative proceedings were instituted.

These so-called "practical considerations" cannot in any event, however, have any effect upon the ruling of the court if the language of the statutes is clear, as we contend it is, to the effect that the statute starts running when the violations occur.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this court and that the petition for writ of certiorari should be denied.

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